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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**JOSE CHILE,**

**Defendant and Appellant.**

**A123179**

**(San Francisco County  
Super. Ct. No. 202175)**

Jose Chile appeals from an order revoking his probation and sentencing him to prison following an altercation with employees on a municipal bus. He contends the trial court abused its discretion when it imposed a prison term rather than reinstating probation. We affirm.

*I. FACTS AND PROCEDURAL HISTORY*

On June 6, 2007, police officers responded to a report that appellant was sitting in a city-owned utility vehicle at the Franklin Square Park and refused to leave. He smelled strongly of alcohol and had broken the vehicle's signal lever and manual holder. When the officers approached appellant to take him into custody, he resisted their efforts to handcuff him and began thrashing out with his legs. An employee of the Park and Recreation Department told the police that appellant had been a problem for the past two weeks, urinating in the park and challenging a city employee to a fight. While being removed from the police car at the station, he bit an officer on her leg, breaking the skin.

Appellant pled guilty to a felony count of battery on a peace officer on August 1, 2007, in exchange for a dismissal of other charges. (Pen. Code, § 243, subd. (c)(2).) He

was placed on probation subject to the service of one year in county jail, though the court indicated it would consider ordering his early release from custody if he behaved well and participated in the Five Keys Charter School program that was offered through the jail. Following a favorable progress report, the court modified appellant's probation to allow his early release from jail in December 2007.

On the afternoon of March 5, 2008, a city bus stopped at the 18th and Mission Street bus stop. Appellant and other passengers attempted to board through the back door and were told by an off-duty bus driver who was riding along that they should board through the front door instead. The other passengers complied, but appellant became belligerent and began yelling profanities. The driver closed the door as appellant continued to yell outside. Appellant ran alongside the bus as it was pulling away and kicked in the lower window of the front door. Shards of glass cut the hand of the off-duty bus driver, who was standing by the door. The driver stopped the bus and the off-duty driver got out and approached appellant, who was swearing loudly at him in Spanish. Appellant attempted to punch him, but the off-duty driver avoided the blow and held him until the police arrived.

Based on this incident, a petition to revoke appellant's probation was filed. The probation officer recommended that probation be reinstated subject to additional local custody time. Following a contested hearing at which the facts recited above were adduced, the district attorney noted that appellant presented a "community safety issue" and argued in favor of a middle-term prison sentence. The court revoked probation with the following explanation:

"Mr. Chile has had prior convictions for a – for violence in 2001. He was convicted in San Francisco for a misdemeanor, a violation of a 273.5 [corporal injury on a spouse or cohabitant]. [¶] I will note also in 1996 he was convicted of a misdemeanor, obstructing justice, . . . and I believe this was in the state of Arizona. [¶] I also note the presentence report, in the presentence report of August 31, 2007, where the probation officer states that the incident itself, which placed him on felony probation – that he was out of control and attacked the police officer without regard to consequences for his

actions. The court was well aware of that, and it was in hope of trying to get Mr. Chile in a program – and it’s no question when he is in a structured, in-custody program, he does extraordinarily well. It is what he does when he is with the public that the court is concerned about. And he is out of control. And the initial case that he is on felony probation was clear of – where he gets in an altercation with people who are working for the city, police respond and he bites the officer. [¶] Therefore, on this case, the motion to revoke, I find by the preponderance of the evidence that there is a willful violation of probation. [¶] I further find that the defendant is not amenable to probation supervision. Therefore, probation is revoked.” The court then reiterated that appellant was not amenable to continuing on probation and imposed the two-year middle term for his 2007 conviction of battery on a peace officer under Penal Code section 243, subdivision (c)(2).

## II. *DISCUSSION*

Appellant, through his appointed counsel, represents in his opening brief that he was deported to his native El Salvador as a result of the prison sentence imposed in this case. He argues that a remand is required because the trial court failed to consider the “horrific” consequence of deportation when it declined to reinstate his probation. Appellant claims his “alcohol induced temper tantrums” did not involve a “criminal mindset,” and he contends the court should have given him one more opportunity to reform given the circumstances. We reject his claim that the trial court should have reinstated probation rather than sentencing him to prison for a two-year term.

“Sentencing choices such as the one at issue here, whether to reinstate probation or sentence a defendant to prison, are reviewed for abuse of discretion. ‘A denial or a grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.’ [Citation.] A court abuses its discretion ‘whenever the court exceeds the bounds of reason, all of the circumstances being considered.’ [Citation.] We will not interfere with the trial court’s exercise of discretion ‘when it has considered all facts bearing on the offense and the defendant to be sentenced.’ [Citation.]” (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.)

The trial court in this case fully considered appellant's history, the arguments of counsel, and the information contained in the probation reports and defense sentencing memorandum. It gave a reasoned explanation for its sentencing decision, which was amply supported by the record. Although the probation department recommended the reinstatement of probation, the court was not bound to follow that recommendation. (*People v. Downey, supra*, 82 Cal.App.4th at p. 910.) Given appellant's violent conduct, we cannot say the court abused its discretion when it required him to serve a prison sentence rather than reinstating his probation.

Appellant's assertion that he was deported as a result of his prison sentence does not require a different result. There is no information about any deportation in the appellate record itself, and as such, it is not a matter we may consider on appeal. (*In re Carpenter* (1995) 9 Cal.4th 634, 646.) And even if we assume that the possibility of deportation is a circumstance that may weigh in *favor* of a grant of probation (see *People v. Lai* (2006) 138 Cal.App.4th 1227, 1257; compare *People v. Sanchez* (1987) 190 Cal.App.3d 224, 229-232), there is no basis for concluding the trial court failed to consider this factor.

The original probation report noted that appellant had immigrated from El Salvador when he was 15 years old and described him "legal resident" rather than a citizen. The court advised appellant at the change of plea hearing that he could be deported, excluded or denied admission or naturalization as a result of his conviction. The record does not support appellant's claim that the court failed to consider the possibility of deportation when it sentenced him to prison. (See Cal. Rules of Ct., rule 4.409; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1313 [unless record affirmatively shows otherwise, court deemed to have considered relevant sentencing criteria].)

III. *DISPOSITION*

The judgment is affirmed.

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NEEDHAM, J.

We concur.

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JONES, P. J.

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BRUINIERS, J.\*

\* Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.